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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **RENE GUTIERREZ,** **Defendant and Appellant.**	**A153194** **(Contra Costa County Super. Ct. No. 51705821)**

A jury found Rene Gutierrez guilty of one count of committing a lewd act upon Doe 1 (Pen. Code, § 288, subd. (a); count 1),[1] one count of first degree burglary (§ 459; count 2), six counts of committing lewd acts upon Doe 2 (§ 288, subd. (a), counts 3, 4, 5; § 288, subd. (c)(1), counts 6, 7, 8), and three counts of committing lewd acts upon Doe 3 (§ 288, subd. (c)(1); counts 9, 10, 11). The trial court sentenced Gutierrez to four consecutive terms of 25 years to life for counts 1, 3, 4, and 5 (§ 667.61, subd. (a)), and to a determinate term of 10 years for the remaining convictions. Gutierrez appeals. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

By information, the prosecutor charged Gutierrez with ten counts of committing lewd acts upon three different victims (§ 288, subds. (a), (c)(1)), and one count of first degree burglary (§ 459).

[1] All undesignated statutory references are to the Penal Code.

A. *Doe 1's Testimony*

At the time of her testimony, Doe 1 was 11 years old. During a family get-together a year earlier, Doe 1 and her cousins went to sleep in the living room. Doe 1 slept on the couch. The adults slept in two other rooms, and Gutierrez went to sleep in his car.

In the middle of the night, Gutierrez came into the house, sat next to Doe 1 on the couch, and began touching her. Gutierrez touched her feet and her vagina over her pajama pants. Doe 1 got up and Gutierrez began asking her questions. Doe 1 moved away from the couch and lay down with her cousins on the floor.

Doe 1's aunt (Doe 3) came out from her bedroom and asked Gutierrez what he was doing. Gutierrez did not respond and went back to his car. Doe 3 asked Doe 1 what happened, and Doe 1 told her aunt Gutierrez touched her feet and her private part. Doe 3 called the police.

B. *Doe 2's Testimony*

When Doe 2 was between 10 and 12 years old, her mother married Gutierrez.[2] Doe 2, her sister, and their mother moved in with Gutierrez in Shafter, Kern County. Shortly afterwards, Gutierrez began touching Doe 2's vagina over her clothes when she was sleeping on the floor in the back house. During the first year she lived with him, Gutierrez touched Doe 2's vagina over her clothes "multiple times a day" or "every few other days."

Gutierrez's conduct became worse when her older sister moved out. Gutierrez pinned Doe 2 down and "force kiss[ed]" her on her mouth. When Doe 2 was sleeping on the floor, Gutierrez masturbated close to her face. At first, Doe 2 was confused, and then she was scared. Doe 2 was not strong enough to prevent Gutierrez's conduct. Gutierrez broke the bathroom door, and he watched Doe 2 while she showered. Gutierrez also broke the door to Doe 2's bedroom. The touching stopped during Doe 2's sophomore year in high school, when she moved in with her ex-fiancé.

[2] Gutierrez testified he met and married Doe 2's mother in 2004 or 2005. Doe 2's 13th birthday was in March 2004.

C. *Doe 3's Testimony*

At the time of her testimony, Doe 3 was 27 years old. Doe 3 lived in Oakley, California, with her husband, her four children, and her niece, Doe 1. Prior to that, Doe 3 lived in Shafter and Bakersfield in Kern County.

In 2005 or 2006, Doe 3's mother married Gutierrez. When Doe 3 was 14 years old, Gutierrez began touching her vagina. The first incident occurred when Doe 3 was sick or had a cold, and she went to sleep next to her mother in the back house. When Doe 3 woke up, Gutierrez was touching her vagina. Gutierrez touched Doe 3 inappropriately, "[a] lot of times. Three to four times."

Gutierrez also grabbed Doe 3 above her vagina, and he touched her breast "two times that I remember." Doe 3 "[s]mack[ed] his hand out of the way." Doe 3 did not tell her mother about Gutierrez's behavior because her mother "was going through a lot of mental things." Doe 3 was afraid her mother would not believe her.

When Doe 3 was 15 or 16 years old, she and her brother ran away to Mexico. Doe 3 was afraid to come back home so she got "married at a young age." Doe 3 left her sister, Doe 2, behind. According to Doe 3, she "messed up" by leaving her sister with Gutierrez.

About three years before her testimony, Doe 3 moved to Oakley, California, where she lived with her husband, her four children, and her niece, Doe 1. In September 2016, there was a family get-together. Gutierrez drove a number of persons to the event, including Doe 3's mother and her boyfriend. Doe 3 slept in her bedroom and the children slept in the living room. Gutierrez was supposed to sleep outside in his car.

In the middle of the night, Doe 3 was not comfortable, and she told her husband she was going to check on the children. When Doe 3 entered the living room, she saw Gutierrez on the sofa with Doe 1, who was slouching or sliding down from the sofa onto the floor. Doe 3 asked Gutierrez what he was doing. Gutierrez responded: " 'Nothing. We're just talking.' " It was around 4:00 a.m.

As soon as Gutierrez left, Doe 1 burst into tears and told Doe 3 that Gutierrez touched her private area over her clothes. Doe 3 got mad and called the police. Doe 3

spoke with an officer. When Doe 3 took Doe 1 to an interview center several days later, it was also the first time Doe 3 spoke about what Gutierrez did to her.

D. *Doe X's Testimony*

Doe X lives in Shafter, California. In July 1998, when Doe X was 10 years old, she was invited to Gutierrez's apartment. Doe X spent the night in the apartment, in the same room as Gutierrez and his girlfriend. Doe X slept on the floor.

In the middle of the night, Doe X woke up to find Gutierrez touching her vagina, which she found painful, and she was very scared. Doe X believed Gutierrez removed her shorts or underwear. When she pretended to wake up, Gutierrez stopped touching her. The next day, Doe X told her mother what happened, and her mother called the police.

E. *Gutierrez's Testimony*

Gutierrez worked as a security guard, a taxi driver, and he was also a secretary for AA meetings. Gutierrez denied he touched Doe X inappropriately in 1998. With regard to Doe 2 and Doe 3, Gutierrez claimed he could not recall what happened. When asked if he touched them inappropriately, Gutierrez testified: "I cannot say I did. I cannot say I did not." At the time, Gutierrez suffered from "blackouts" because of his "drinking problems."

Regarding the incident with Doe 1, Gutierrez claimed Doe 3 and her husband gave him access to their house, and he denied touching Doe 1. Gutierrez stayed "outside in the car, not to sleep but to clean the car and have it ready for the morning . . . so I could go taxi driving again." Gutierrez claimed he went into the house to wake up his ex-wife, her boyfriend and his mother because he had to drive them back to Bakersfield. Gutierrez went to the room where they were sleeping, the kitchen and the bathroom. He claimed he was nodding off to sleep on the couch when Doe 3 asked him what he was doing there. He believed Doe 3 got mad because one of the children who had to go to school the next morning woke up. Gutierrez went back outside and fell asleep in his car. Soon afterwards, he was arrested.

Gutierrez has been arrested multiple times. After his first arrest, Gutierrez pled guilty, and he was required to register as a sex offender. Gutierrez believed Doe X was biased against him because of an incident involving Gutierrez and Doe X's uncle. Gutierrez acknowledged he went to prison based on a charge of committing a lewd act upon Doe X in 1998, but he denied he engaged in the conduct.

F. *Verdict and Sentence*

A jury found Gutierrez guilty of one count of committing a lewd act upon Doe 1 (Pen. Code, § 288, subd. (a)), six counts of committing a lewd act upon Doe 2 (§ 288, subds. (a), (c)(1)), and three counts of committing a lewd act upon Doe 3 (§ 288, subd. (c)(1)). The jury also found Gutierrez guilty of first degree burglary (§ 459). The court sentenced Gutierrez to an indeterminate term of 100 years to life and to a determinate term of 10 years in prison.

DISCUSSION

On appeal, Gutierrez challenges numerous aspects of his trial and sentence.[3] We begin with his appeal of his burglary conviction.

I.

The Burglary Conviction Was Not Based on a Legally Invalid Theory and It Did Not Require a Unanimity Instruction

Gutierrez argues the burglary conviction and the special finding that he committed a lewd act upon Doe 1 during a burglary "must be reversed because the verdict may have been based on a legally invalid theory of burglary." He also argues this conviction and special finding "must be reversed because the court failed to instruct the jury on the need to unanimously agree on which entry constituted the burglary." We disagree.

A. *Governing Law*

Section 459 provides in part that "[e]very person who enters any house, room, . . . or other building . . . with intent to commit . . . any felony is guilty of burglary." However, "a defense to a charge of burglary is available 'when the owner

[3] In his opening brief, Gutierrez requested we direct the court to correct clerical errors in the abstract of judgment. In his reply brief, Gutierrez withdraws this request.

actively invites the accused to enter, *knowing* the illegal, felonious intention in the mind of the invitee. . . . [T]he owner-possessor must know the felonious intention of the invitee. There must be evidence "of informed consent to enter *coupled* with the 'visitor's' knowledge the occupant is aware of the felonious purpose and does not challenge it." ' [Citation.]" (*People v. Sherow* (2011) 196 Cal.App.4th 1296, 1302.) For example, if a pawnshop owner knows a patron is selling stolen goods and consents to the patron's entry for that purpose, and if the patron knows the owner is aware of this illegal intention, then the patron cannot be found guilty of burglary. (*Id.* at pp. 1302–1303.)

B. *The Jury Instruction on Burglary and the Prosecutor's Closing Argument*

Here, the jury was instructed, in accordance with CALCRIM No. 1700, that the prosecutor had to establish Gutierrez "entered a building or room within a building," and "[w]hen he entered a building or room within a building, he intended to commit [a] lewd act upon a child under the age of 14."

During closing arguments, the prosecutor argued as follows: "So we know from both . . . Doe 1 . . . and . . . Doe 3 . . . that on September 26 the defendant slept outside. . . . So did he enter? Well, yes, he was caught in the residence by . . . Doe 3 . . . . So we have element one, he entered. [¶] Maybe he had permission to come in for the bathroom, but my argument is he had no permission to go to the living room couch. So I will argue there's two theories. One, . . . he's supposed to stay outside: 'You're not allowed in here with the children.' But if he was thinking someone else told him he had permission to come in to use the bathroom, under both theories he still came in with the intent to commit the lewd act. [¶] So how do we know the circumstances of the burglary? It's 3:00 in the morning, it's dark. There's no adults awake. And a man with a prior conviction for touching a ten-year-old who was sleeping at the time, is entering the residence where there's sleeping children. He doesn't wake the adults first. He goes to the couch where there's a child. He doesn't wake the boys. He goes to the girl. And he sits down next to her and hugs her. . . . [¶] The defense is going to stand up here and tell you that he was allowed to come in to use the bathroom. Okay. Let's assume that's true. That means he's walking in this door, which I believe I'm now looking at Defense A, but

above the 'P' in the word patio is . . . the front door, kind of by the television, somewhere in this area by the patio. [¶] The bathroom is straight in and to his left. The bathroom is nowhere near this couch, the vertical red couch which was the couch that . . . Doe 1 . . . was sleeping on. He had no permission . . . to go right. He had permission to enter and go left and then leave."

C. *No Invalid Theory of Burglary*

Based on this argument, Gutierrez contends "[t]he prosecutor's theory [that Gutierrez] committed a burglary in the 'living room' separate from and alternative to a burglary of the house was legally insufficient because the 'living room' was not a 'room' as that term has been construed for purposes of burglary. Because the jury's findings were not certainly based on entry of the house rather than entry of the 'living room,' the verdict must be reversed." In other words, Gutierrez argues the prosecutor's two theories concerned the difference between entering *the house* or the *living room*. Gutierrez contends this focus was incorrect because the living room "was not separated from the rest of the house."

We reject this argument. Anticipating that Gutierrez might claim he had consent to enter to use the bathroom, the prosecutor argued that even so, he did not have permission to enter to commit a lewd act upon a child, and, based on where Gutierrez went when he entered the building, the jury could reasonably infer he had the requisite intent to be found guilty of burglary. Accordingly, the prosecutor's two "theories" depended on whether the jury concluded Gutierrez did or did not have permission to enter to use the bathroom. The prosecutor implied that even if he had this permission, there was no evidence he had permission to enter to commit a lewd act upon a child. (See *People v. Frye* (1998) 18 Cal.4th 894, 954 ["a person who enters for a felonious purpose may be found guilty of burglary even if he enters with the owner's or occupant's consent."], disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390,

421, fn. 22.)[4] Because Gutierrez misconstrues the prosecutor's argument, he fails to demonstrate the burglary conviction was based on a "legally invalid theory."

D. *A Unanimity Instruction Was Not Required*

Next, Gutierrez contends the court failed to instruct the jury on the need to unanimously agree on which entry constituted the burglary. Without citing to the record, Gutierrez claims "the prosecutor proved two entries, each with the same intent." We are not persuaded.

When a defendant is charged with a single criminal offense, but the evidence suggests more than one discrete crime, either the prosecutor must elect among the crimes or the court must require the jury to agree on the same criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) However, "where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. [Citation.] The crime of burglary provides a good illustration of the difference between discrete crimes, which require a unanimity instruction, and theories of the case, which do not. Burglary requires an entry with a specified intent. [Citation.] If the evidence showed two different entries with burglarious intent, for example, one of a house on Elm Street on Tuesday and another of a house on Maple Street on Wednesday, the jury would have to unanimously find the defendant guilty of at least one of those acts. If, however, the evidence showed a single entry, but possible uncertainty as to the exact burglarious

[4] Surprisingly, the Attorney General contends the prosecutor argued "an invalid theory of burglary to the jury—that defendant committed burglary when he entered a portion of the living room to which he knew he did not have an invitation, i.e., the couch area upon which Doe 1 was sleeping." Having reviewed the prosecutor's closing argument, we do not agree with the Attorney General's contention. At one point, the prosecutor referred to how a guest with permission to enter a house commits burglary if he or she enters "another room" in the house with the intent to steal an item from that room. But that hypothetical does not apply to the facts of this case: both sides agree the front door opened directly into the living room. The prosecutor discussed where Gutierrez went when he entered—to the living room couch rather than to the bathroom—because it was circumstantial evidence of his intent to commit a felony.

intent, that uncertainty would involve only the theory of the case and not require the unanimity instruction." (*Id.* at pp. 1132–1133.)

In this case, Gutierrez was charged with one count of burglary based on his entry into Doe 3's house on September 26, 2016. The jury was instructed the prosecutor had to establish that Gutierrez "entered a building or room within a building." This instruction indicates Gutierrez's entry could be described in different ways, but these are merely different ways of describing the same act. Because there was only one crime of burglary that could be described in different ways, no unanimity instruction was required. (*People v. Russo*, *supra*, 25 Cal.4th at p. 1132.)

II.

The Court's Admission of Doe X's Testimony Did Not Render Gutierrez's Trial Unfair

Gutierrez argues that Doe X's testimony deprived him of a fair trial. We disagree.

A. *The Motion in Limine*

Prior to trial, Gutierrez moved for "an order excluding the admission of, or reference to, any evidence of any alleged prior criminal acts by" Gutierrez. After hearing argument from counsel, the court denied the motion, finding Doe X's testimony admissible under Evidence Code sections 1108 or 1101, subdivision (b). During trial, Gutierrez renewed his objection that Doe X's testimony was highly prejudicial and cumulative. The court overruled the objection noting it "reviewed the factors under [Evidence Code section] 1108 as well as completing a [section] 352 analysis as to weighing of the potential prejudice to the defendant . . . , and I am finding it highly relevant and shows the defendant's propensity to commit not only sexual offenses against children, but in a particular fashion with a particular intent as well as common scheme or plan."

B. *Evidence Code Sections 1101 and 1108*

Generally, "evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) But evidence of other acts is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge . . . .)

other than his or her disposition to commit such an act." (*Id.*, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 401–402 ["evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan."].) In addition, "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a).) Evidence Code section 1108 applies to both uncharged and charged prior offenses. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1164.)

Under Evidence Code section 352, evidence may be excluded "if its probative value is substantially outweighed by the probability that its admission will be unduly prejudicial." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095.) Prejudice in this context "refers to evidence that uniquely tends to evoke an emotional bias against the defendant as an individual, and has little to do with the legal issues raised in the trial." (*Ibid.*) We review a ruling under Evidence Code section 352 for abuse of discretion. (*People v. Merriman* (2014) 60 Cal.4th 1, 74.) We may reverse if the ruling is " ' "arbitrary, capricious, or patently absurd." ' " (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)

C. *No Due Process Violation*

On appeal, Gutierrez argues the court's admission of Doe X's testimony to prove his propensity for lewd conduct with young girls deprived him of his right to due process. The California Supreme Court rejected this argument in *People v. Falsetta* (1999) 21 Cal.4th 903, 922. As Gutierrez recognizes, we are not at liberty to disregard our high court's decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We reject Gutierrez's due process challenge to the court's admission of Doe X's testimony.

D. *No Abuse of Discretion*

In arguing the court abused its discretion by admitting Doe X's testimony, Gutierrez's main argument is that the incident with Doe X was "very remote, having occurred nearly 20 years prior to trial and 18 years prior to the alleged conduct with Doe 1." But "the passage of a substantial length of time does not automatically render the prior incidents prejudicial." (*People v. Soto* (1998) 64 Cal.App.4th 966, 991.) Moreover, "substantial similarities between the prior and the charged offenses balance out the remoteness of the prior offenses. [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 285.)

Here, there are substantial similarities between the charged offenses and Doe X's testimony regarding Gutierrez's conduct. Like the victims of the offenses at issue, Doe X was a young girl whom Gutierrez touched on her vagina while she was sleeping. Gutierrez concedes Doe X's testimony was not "more inflammatory than [the testimony regarding] the charged offenses." In addition, Doe X's testimony was brief, covering only eight pages of the reporter's transcript. Nor are we persuaded by Gutierrez's claims that Doe X's testimony presented "unique obstacles," or that the similarity of the prior conduct to the charged conduct "contributed to the risk of confusion." We discern no abuse of discretion in the court's admission of Doe X's testimony.

E. *Any Error Was Harmless*

Even if the court abused its discretion, the error was harmless because Gutierrez cannot show it is reasonably probable he would have obtained a more favorable result if the jury did not hear Doe X's testimony. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 659 [error in admission of evidence is tested for prejudice under standard of *People v. Watson* (1956) 46 Cal.2d 818, 836].) If Doe X had not testified, the jury would still have learned about Gutierrez's prior conviction because the court also admitted an exhibit showing Gutierrez's 1998 conviction for the conduct involving Doe X.

For similar reasons, we reject Gutierrez's concern regarding the prosecutor's reference to Gutierrez as a " 'bedtime predator.' " The testimony of Does 1, 2, and

3—each of whom testified that Gutierrez touched them on their vaginas while they were sleeping—supported the prosecutor's remark. Gutierrez also complains that one juror was affected by Doe X's testimony, but, as Gutierrez himself acknowledges, a few days later the same juror expressed confidence he could remain impartial.

III.

The Jury Instructions Based on CALCRIM Nos. 375 and 1191

Next, Gutierrez contends that CALCRIM Nos. 375 and 1191 "impermissibly carve out an exception to the burden to prove each circumstance in the chain leading to an inference of appellant's guilt beyond a reasonable doubt." We disagree.

In *People v. Virgil* (2011) 51 Cal.4th 1210, our Supreme Court rejected the argument that evidence of other crimes should be proved beyond a reasonable doubt rather than by a preponderance of the evidence. (*Id.* at p. 1259.) Our Supreme Court also rejected the argument that this lower standard of proof conflicted with the requirement that "each essential fact in the chain of circumstances necessary to establish guilt" must be proved beyond a reasonable doubt. (*Ibid*.) Similarly, in *People v. Reliford* (2003) 29 Cal.4th 1007, our Supreme Court rejected the contention that the predecessor to CALCRIM No. 1191 was likely to mislead the jury concerning the prosecutor's burden of proof. (*Reliford*, at pp. 1012–1016.) Based on *People v. Virgil*, *supra*, at p. 1259, and *Reliford*, at pp. 1012–1016, we reject Gutierrez's argument that the instructions provided in this case impermissibly lowered the prosecutor's burden of proof. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

IV.

Substantial Evidence Supports Gutierrez's Convictions for Lewd Conduct Involving Does 2 and 3

Gutierrez challenges the sufficiency of the evidence in support of his convictions for committing lewd acts upon the bodies of Doe 2 and Doe 3. We are not persuaded.

A. *Governing Law and Standard of Review*

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty

beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Jones* (1990) 51 Cal.3d 294, 313–314 (*Jones*).)

In child molestation cases, a witness's "generic testimony" is sufficient to sustain a conviction if the victim can "describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period." (*Jones*, *supra*, 51 Cal.3d at p. 316.)[5]

B. *Substantial Evidence of Lewd Conduct*

Here, in counts 3, 4, and 5, Gutierrez was charged with committing lewd acts upon the body of Doe 2 between March 18, 2004 and March 17, 2005. Doe 2 testified that during her first year living with Gutierrez, he sometimes touched her vagina over her clothes "multiple times a day. Other times it would be like every few other days." There was evidence Doe 2 was 13 years old during her first year living with Gutierrez. Thus, Doe 2 described the acts committed (touching her vagina over her clothes), the number of acts committed with sufficient certainty to support each of the counts (sometimes multiple times a day; other times, every few days), and the general time period (during her first year living with Gutierrez). "Additional details regarding the time, place or

[5] Gutierrez questions whether *Jones* is compatible with the due process clause of the Fourteenth Amendment. We are bound by *Jones*. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.)

circumstance . . . are not essential to sustain a conviction." (*Jones, supra*, 51 Cal.3d at p. 316.)

Doe 2 testified that Gutierrez's conduct "got worse" when her sister left the house. Gutierrez would "pin" her down and "force kiss" her. When she was sleeping on the ground, Gutierrez masturbated close to her face. According to Doe 2, Gutierrez did not stop touching her until she was a sophomore in high school, when she moved out of Gutierrez's house and in with her ex-fiancé. This evidence was sufficient to support the jury's verdict that Gutierrez was guilty of committing at least three lewd acts upon the body of Doe 2 when she was 14 and 15 years old, and when Gutierrez was at least 10 years older, in violation of section 288, subdivision (c)(1), as alleged in counts 6, 7 and 8.

Gutierrez was also convicted of three counts of committing a lewd act upon the body of Doe 3, between January 18, 2004 and January 17, 2006, in violation of section 288, subdivision (c)(1). Doe 3 testified Gutierrez began touching her inappropriately after her family moved in with him when she was 14 or 15 years old. In the back house, Doe 3, who was feeling sick, woke up to find Gutierrez touching her vagina. Gutierrez touched Doe 3's body "[a] lot of times. Three to four times." Gutierrez also touched Doe 3 close to her vagina, and he touched her breast twice. This evidence was sufficient to support the three convictions based on lewd conduct involving Doe 3. (*Jones*, *supra*, 51 Cal.3d at pp. 313–314.)

V.

The Errors in the Court's Unanimity Instruction Were Harmless

Gutierrez challenges the court's unanimity instruction. We conclude the errors in the instruction were harmless.

A. *Governing Law*

The California Constitution guarantees the right to a unanimous jury in criminal cases. (*Jones, supra*, 51 Cal.3d at p. 321.) "In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. [Citation.] But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the

defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim." (*Id.* at pp. 321–322.)

B. *The Jury Instruction*

Here, the instruction based on CALCRIM No. 3501 provided: "The defendant is charged with lewd act upon a child between the ages of 14 and 15 years old in Counts 5-7 sometime during the period of March 18, 2005 to March 17, 2007. He is additionally charged with lewd act upon a child between the ages of 14 and 15 years old in Counts 8-11 sometime during the period of January 18, 2004 to January 17, 2006. [¶] The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense; [¶] OR [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged."

C. *The Errors in the Instruction Were Harmless*

The Attorney General concedes "the court mistakenly included count five in the trio of allegations that occurred against Doe 2 between March 18, 2005 and March 17, 2007, and . . . the court did not give any unanimity instruction applicable to counts three and four which occurred against Doe 2 between March 18, 2004 and March 17, 2005." The Attorney General also concedes "the court mistakenly included count eight, which was applicable to Doe 2, among the charges occurring against Doe 3 between January 18, 2004 and January 17, 2006." Nonetheless, the Attorney General argues these errors were both forfeited and harmless.

Preliminarily, we conclude Gutierrez's arguments based on these errors are not forfeited. In *People v. Milosavljevic* (2010) 183 Cal.App.4th 640, the court found the omission of a count from a unanimity instruction affected the defendant's substantial

rights and may be raised on appeal, even if there was no objection below. (*Id.* at p. 646.) The same analysis applies here.[6] Considering Gutierrez's arguments on their merits, there is a split of authority whether we apply *Chapman v. California* (1967) 386 U.S. 18, 24, or *People v. Watson*, *supra*, 46 Cal.2d at p. 836, in assessing prejudice due to a court's failure to give a unanimity instruction. (*People v. Matute* (2002) 103 Cal.App.4th 1437, 1449–1450.) We consider the effect of the errors using both standards. (*Ibid.*)

Here, despite these errors in the instruction, the prosecutor correctly explained that counts 3 to 5, which concerned a violation of section 288, subdivision (a), related to conduct that occurred in 2004 or 2005 when Doe 2 was 13 years old, and the charges were based on Doe 2's testimony that Gutierrez touched her multiple times on her vagina. The prosecutor correctly explained that counts 6 to 8, which concerned a violation of section 288, subdivision (c)(1), were based on Doe 2's testimony that Gutierrez continued to touch her when she was 14 and 15 years old, and she also testified that he pinned her down, used force to kiss her, and he masturbated close to her face.

Gutierrez did not deny he engaged in this conduct. Instead, he testified he could not recall because he had drinking problems and suffered from blackouts. Based on the prosecutor's correct explanation of the instruction to the jury, and the testimony of Doe 2 and Gutierrez, we are convinced beyond a reasonable doubt the jury unanimously agreed on which act Gutierrez committed for each charged offense against Doe 2, or they agreed he committed all the acts described by Doe 2, and, thus, they necessarily agreed he committed at least three lewd acts when she was 13 (counts 3, 4 and 5), and at least three lewd acts when she was 14 or 15 (counts 6, 7, 8). (*People v. Matute*, *supra*, 103 Cal.App.4th at pp. 1449–1450 [finding failure to provide unanimity instruction harmless beyond a reasonable doubt because prosecutor clearly explained the number of counts, the time frame at issue, and the evidence amply supported the number of counts]). In addition, it is not reasonably probable Gutierrez would have achieved a more favorable

[6] We assume without deciding that the failure to identify the correct date ranges for counts 5 and 8 should be treated in the same way as the failure to provide any unanimity instruction regarding counts 3 and 4.

result if the unanimity instruction included counts 3 and 4, and included the correct date ranges for counts 5 and 8. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

Next, Gutierrez contends the instruction incorrectly stated the principle of unanimity. Gutierrez focuses on the second part of the instruction, which provided that the jury "must not find the defendant guilty unless: [¶] . . . [¶] You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged." Gutierrez contends the instruction should have explained that "the acts alleged" referred to the witnesses' testimony, not the acts charged in the information.

Unlike the court's failure to provide a unanimity instruction regarding particular counts, or its failure to identify the correct date range for particular counts, we agree with the Attorney General that Gutierrez forfeited this challenge to the language of the instruction by failing to object below. (*People v. Milosavljevic*, *supra*, 183 Cal.App.4th at p. 648.) Even if Gutierrez did not forfeit this claim, the jury could not have interpreted the instruction in the manner he suggests. The language of the instruction, which tracked the language of CALCRIM No. 3501, provided the jury had to agree "the People have *proved* that the defendant committed all the acts alleged to have occurred . . . ." (Italics added.) Thus, the language of the instruction directed the jury to focus on the evidence, not the allegations. We discern no error in the instruction's use of the phrase "the acts alleged."

VI.

The Prosecutor's Explanation Did Not Prejudice Gutierrez

Gutierrez argues the prosecutor engaged in misconduct when explaining the burden of proving the charges beyond a reasonable doubt. We conclude the error, if any, was harmless.

A. *Governing Law and Standard of Review*

"Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, 'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the

prosecution from its . . . obligation to overcome reasonable doubt on all elements [citation].' [Citations.] To establish such error, bad faith on the prosecutor's part is not required. [Citation.] [¶] . . . [¶] When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 666–667.)

B. *The Prosecutor's Argument and the Court's Admonition*

When explaining his burden of proof to the jury, the prosecutor stated "proof beyond a reasonable doubt does not mean I have to prove beyond any possible doubt or to a [one] hundred percent certainty. If I did, all of us prosecutors would be without a job." The prosecutor explained that "everything in life is open to some possible doubt, but we have to look at what is reasonable. We have been coming here for the last two, two and a half weeks. You've seen me sit at this chair. Every day I'm dressed, I'm shaved, my hair, my shoes, I'm in my suit. [¶] Now, how do I commute here? Do I commute here every day from Los [Angeles] by a flight? Do I leave this courthouse at 4:30, jump on a flight to LA where I live, and then turn back the next morning on a first flight out of LA to Oakland and then drive here? Is that—is that one possibility? I mean, sure, it's possible. I'm sure if I could time it, I could do it. But is it reasonable? [¶] If it's not reasonable, then you would reject that. You would say, 'I guess that's a possibility, but that is not reasonable that you're commuting from LA.' "

Defense counsel objected the prosecutor was "lowering the standards of reasonable doubt by analogizing as to how he's dressed and how he comes to court." In response to the objection, the court told the jury, "this is argument. You have been provided the law." A little later, when defense counsel again objected the prosecutor was watering down the standard, the court told the jury to "[p]lease pay attention to the reasonable doubt instruction. It needs to be precisely followed."

C. *The Error, If Any, Was Harmless*

Gutierrez contends that by "equating" the standard of proof beyond a reasonable doubt to "ordinary choices" or "everyday circumstances," the prosecutor trivialized the standard. As explained by our Supreme Court over 140 years ago, "[t]he judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence. Juries are permitted and instructed to apply the same rule to the determination of civil actions involving rights of property only. But in the decision of a criminal case involving life or liberty, something further is required. . . . There must be in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, derived from a comparison and consideration of the evidence." (*People v. Brannon* (1873) 47 Cal. 96, 97.)

Here, assuming without deciding that the prosecutor's explanation was improper, Gutierrez fails to establish there was a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Centeno*, *supra*, 60 Cal.4th at p. 667.) In *People v. Nguyen* (1995) 40 Cal.App.4th 28, when considering a similar argument, the court determined the defendant "was not prejudiced since the prosecutor did direct the jury to read the reasonable doubt instruction and the jury was correctly instructed on the standard. We must presume the jury followed the instruction and that the error was thereby rendered harmless." (*Id.* at pp. 36–37.)

Similarly here, during his closing argument, the prosecutor also referred to CALCRIM No. 220, which instructed the jury that "[p]roof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true." Shortly after the prosecutor made his complained-of comments, the court admonished the jury that they should follow precisely the language of the instruction on proof beyond a reasonable doubt. The written instruction was correct. "We presume the jury followed the court's instructions." (*People v. Avila* (2006) 38 Cal.4th 491, 573–574.) Thus, the error, if any, was harmless.

VII.

No Cumulative Error

Gutierrez's final argument is that the judgment must be reversed because "the previously discussed errors were cumulatively prejudicial to his right to a fair trial." Here, we have identified no errors or determined they were harmless. "In the absence of error, there is nothing to cumulate." (*People v. Duff* (2014) 58 Cal.4th 527, 562.)

DISPOSITION

We affirm the judgment.

_____
Jones, P.J.

WE CONCUR:

_____
Simons, J.

_____
Burns, J.

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